IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

NO. 24

JOSEPH WALLER, JR.,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

BRIEF OF THE RESPONDENT

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TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

CITATIONS, continued

CITATIONS, continued Page

CONSTITUTION

STATUTES

RULES

CODE

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OPINIONS BELOW

Respondent concedes that the opinions involved below are those represented by petitioner in his brief at page one thereof.

JURISDICTION

Respondent concedes that this Court had jurisdiction to

consider this matter pursuant to 28 USC, § 1257 (3) and that the matter was timely brought to it for such action as it elected to take.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent concedes that, depending upon the outcome, it well may be accurate that the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution may be here involved.

It is possible that Section 12 of the Declaration of Rights of the Constitution of the State of Florida (1885) may be involved just as Article I, Section 9, of the 1968 revision thereof may be involved.

Certainly Section 811.021, Florida Statutes, is involved since it formed the predicate for petitioner's felony conviction of larceny.

Sections 25.14 and 25.15 of the municipal code of the city of St. Petersburg, Florida, are likewise (if only tangentially) probably involved.

QUESTIONS PRESENTED

Respondent accepts the questions presented as posed by petitioner in his brief at page six thereof.

STATEMENT OF THE CASE

The statement of the case presented by petitioner in his brief at pages six through ten is a reasonably accurate summary of the various steps taken below and is therefore accepted.

SUMMARY OF ARGUMENT

Petitioner's complaint, whether viewed in light of *BENTON v. MARYLAND*, 395 U. S. 784 (1969), or the general principles which preceded it simply cannot support a claim of double jeopardy since the predicate for the same crime or offense does not exist.

If his quarrel is based on the principle of collateral estoppel or *RES ADJUDICATA*, then neither of the doctrines, however viewed, are entitled to status as a constitutional mandate.

The availability of the presentence investigation report is or should be a matter within the appropriate procedural controls of the courts of the several states. Not unlike the reason why *McNABB v. U.S.*, 318 U.S. 332, 340, 87 L.ed. 819, 63 S.Ct. 608, reh den 319 U.S. 784, 87 L.ed. 1727, 63 S.Ct. 1322, has not been impressed upon the several states as a constitutional requirement so the disposition made by the court of a P.S.I. report should not be constitutionally ordained.

We do not require the identity of a confidential informant to be disclosed except in the most compelling of circumstances-- just as a federal judge today may, pursuant to rule, withhold making available his P.S.I. report. If he need not, then we know of no basis upon which it either could or should

be urged that making such a report available in the several state courts is a constitutional must.

ARGUMENT

POINT I

A. Lest there be any quarrel with what this Court's position may be with regard to whether the Fifth Amendment proscription against double jeopardy is made applicable to the states by virtue of the due process clause of the Fourteenth Amendment to the United States Constitution, respondent concedes that as of the date that it rendered its decision in *BENTON v. MARYLAND,* 395 U.S. 784 (1969), that is now the national rule.

Respondent would add, however, that petitioner seems to say that this Court has now, by virtue of what it did in *BENTON,* supra, declared itself open for any complaint with regard to double jeopardy.

In truth and fact, as we read *BENTON,* supra, what this Court said, meant and did was simply to judicially proclaim that thereafter anyone so aggrieved could come to this Court with such a complaint from any one of the fifty states which themselves did not, by law, rule or decision, proscribe double jeopardy.

Said another way, *BENTON,* supra, did not become a second laundry for a simple complaint that a state court should have held for one complaining regarding double jeopardy but

rather that such persons who could not complain of it now had the supreme forum in which to lodge it. Really all that was done was to put the capstone of a constitutional mandate on the principle which most states already had. Indeed, that was the case with the colonies long before the federal government breathed its first.

In that sense, it may be safely said that for our purposes, the decision of this Court in *BENTON*, supra, is not to be applied retroactively but that even if it is, it is simply the supreme restatement of already well-established principles. The question will redound until resolved--if this is so, has petitioner demonstrated that his circumstances place him within the protective pale of either *BENTON*, supra, or the principles pursuant to which it might have been reviewed in other circumstances?

This is best exemplified by the fact that Florida preceded the federal government's strict view of unreasonable searches and seizures by some two years and yet cases involving that question were entertained and reversed by this Court before its decision in *MAPP v. OHIO*, 367 U.S. 643, 6 L.ed.2d 1081, 81 S.Ct. 1684, which, for the first time, articulated the principle that the proscription against unreasonable searches and seizures in the federal constitution was being made applicable to the state via the due process clause of the Fourteenth Amendment.

Therefore, *BENTON*, supra, is not new magic but is rather a view into the manner in which it will hereafter be viewed by this tribunal. Indeed, how in the name of heaven could *BARTKUS v. ILLINOIS*, 359 U.S. 121 (1959), *ABBATE v. UNITED STATES*, 359 U.S. 187 (1959), and such other cases have even been considered by this Court (regardless of the outcome) without *BENTON*, supra, as their predicate if the above conclusion is not so. One must therefore inquire: must *BARTKUS*, supra, be reconsidered in light of *BENTON*, supra, or does it stand unless and until reversed for some other reason?

B. Here petitioner's complaint seems to be that since there cannot be a claim of separate sovereigns such as the state and the federal government in a situation where the prosecutions are respectively in a municipal court and a state court, that avenue of securing this Court's judicial approval is not available to respondent. He cites us to the decision rendered by this Court in *REYNOLDS v. SIMS*, 377 U.S. 533 (1964), where, in an attempt to defeat a claim for one man, one vote (more nearly fair apportionment) was sought to be advanced by Alabama using the national congress as a comparison. We all know of the outcome of that argument and especially in the State of Florida - see *SWANN ET AL. v. ADAMS*, 385 U.S. 440, 17 L.ed.2d 501, 87 S.Ct. 569, yet one must wonder at the bona fides of the conclusion rejecting such an argument. Indeed what is there to be said with regard to all those states which were admitted to the union after the establishment of the federal government? Suppose tomorrow Puerto Rico were to seek statehood--could it be said of Puerto Rico thereafter that she had a hand as a state in permitting the federal government to come into being or would it have to be said that she had absolutely nothing whatsoever to say about it and that she was being suffered membership in our republic by the federal government? Very much the same, respondent contends, as the relationship which admittedly exists between the State of Florida and its several municipalities.

Petitioner has neither misled nor incorrectly stated the status of municipalities--they are creatures of the Legislature.

Obviously an individual convicted in a municipal court in Florida has not been convicted of a crime or indeed an offense.

A crime in Florida is either a felony or a misdemeanor, the only difference being the place of confinement. Certainly it could never be argued that any municipality in the State of Florida, since they had existence, makes criminal any violation of its ordinances. Indeed, this very Court in *DUNCAN v. LOUISIANA*, 391 U.S. 145 (1968), concluded that municipal violations were petty offenses and not crimes. Therefore, petitioner has certainly not been placed twice in jeopardy for the same crime. Just as certainly does it follow that he has not been placed in jeopardy twice for the same offense. If anything, he was placed on trial in different forums for three independent acts, one of which was a crime (felony) in violation of Section 811.021, Florida Statutes. It may be true that the action taken by petitioner which resulted in the matter about which he complains was part of one transaction but it is absolutely incorrect to claim that it was one act for which he has been made to pay twice.

Adverting to the principle of separate sovereigns, one cannot approach the issue without considering that the bulk of jurisdictions in this country have adhered to the principle of separate sovereigns for purposes of determining whether jeopardy was single or double. They are: ALABAMA, *PERRY v. CITY OF BIRMINGHAM*, 1956, 88 So.2d 577, cert den 88 So.2d 580; CALIFORNIA, *PEOPLE v. RODRIGUEZ*, 1962, 20 Cal. Reptr. 556; GEORGIA, *TAYLOR v. CURRY*, 1960, 215 Ga. 734, 113 S.E.2d 398; ILLINOIS,*CITY OF CHICAGO v. LORD*, 1954, 3 Ill. App.2d 410, 122 N.E.2d 439, affirmed 130 N.E.2d 504; KANSAS, *CITY OF GARDEN CITY v. MILLER*, 1957, 181 Kan. 360, 311 P.2d 306; MINNESOTA, *STATE v. END*, 1950,45 N.W.2d 378; MISSOURI, *STATE v. GARNER*, 1950, 226 S.W.2d 604; NEW JERSEY, *STATE v. REID*, 1952, 19 N.J. Super. 32,87 A.2d 562; MISSISSIPPI, *BELL v. STATE*,

1965, 170 So.2d 428; NEBRASKA, *STATE v. AMICK*, 1962, 173 Neb. 770, 114 N.W.2d 893; OKLAHOMA, *McCANN v. STATE*, 1940 82 Okl. Cr. 374, 170 P.2d 562; SOUTH CAROLINA, *STATE v. BUTLER*, 1956,94 S.E.2d 761; TENNESSEE, *MULLINS v. STATE*, 1964, 380 S.W.2d 201; WYOMING, *STATE v. JACKSON*, 1955, 291 P.2d 798.

Respondent agrees that some states, such as Colorado, do not follow the majority and that some, such as Virginia, have passed statutes making a conviction under a municipal ordinance or state law a bar to subsequent prosecution under another statute or ordinance. Florida does not have that situation and therefore the matter must be measured in its cold, unadorned status.

Petitioner tells us that the proscription against double jeopardy requires that a defendant be prosecuted no more than once on the basis of a single act or course of conduct. Indeed! As we read the proscriptive legislation, it is directly geared to the word "offence". If petitioner means to say that what he meant was that is how it should be interpreted, then at least we can understand his claim but presently there is a wealth of difference between the word "offence" and "act" or "course of conduct". In short, he wants this Court to reject the word "offence" in the national constitution and insert in its stead the work "act" or the words "course of conduct"--otherwise known as the single transaction test. Well, of course, this Court must consider whether that is really what the national congress had in mind when it drafted the amendment and what the people voted into being.

We are next told that the simple solution to the problem is a mandatory joinder of charges which could have been brought by either sovereign. That may be so, but not in this case simply because hindsight cannot now provide us with what he contends *BENTON*, supra, said some time later. Our courts had no idea that *BENTON*, supra, would be forthcoming but even if they did, it would have been impossible in Florida for any one court to have marshalled the three charges against petitioner, prosecuted and sentenced him. Therefore, we are structurally unable to do so--jurisdictional lines being what they are.

Alarmingly enough what petitioner tells us is that if we put aside the jurisdictional barriers that would make such a composite trial impossible in Florida, he could not be heard to complain had all three charges been brought against him in one court. It is alarming because if he says and means this, neither of the two municipal charges could have been lesser and included. This is really, in the last analysis, the most stunning effect of his position in that he would have wound up with at least the same fate and with at least the tacit approval of both *BARTKUS*, supra, and *ABBATE*, supra. Would it make any difference to petitioner that he sat in a state penal compound for a single "act" or "course of conduct" or in a city compound for two of them and in a state compound for the third? We rather doubt it. By the way, there is simply no fashion by means of which he can maintain the argument of a single act or course of conduct or admit that had it been brought in one court there would have been no jeopardy transgression. If there is a transgression, it would be there without regard to the procedure by means of which he was charged and convicted. In other words, are we going to revisit *BARTKUS*, supra, and *ABBATE*, supra, or are we going to do something less?

It almost must follow that petitioner cannot really be talking about double jeopardy as it must have been considered many years ago. Respondent considers that what he must be making reference to is the doctrine of either collateral estoppel or *RES ADJUDICATA*. There is simply not the same offense or offenses involved in the matter before the Court so it must be this something else. The only thing it can be is either of those two. Assuming our assessment to be accurate, respondent contends that neither doctrine, in the posture of this case (since we have no statute such as that involved in the case of *IN RE MARTINIS*, 244 N.Y.S.2d 949) can be applicable to a criminal proceeding in Florida.

Respondent contends that there are several reasons why the respective doctrines of either collateral estoppel or *RES ADJUDICATA* cannot be applied to criminal prosecutions.

(1) It would be doubtful at best whether the estoppel could apply against petitioner and there is signally lacking the mutuality of estoppel.

(2) Neither the state nor a municipality in Florida is able to appeal from a verdict in favor of a given defendant no matter how erroneous it may be. While such an acquittal stands as an absolute bar to a further proceeding thereon, it would be a gross injustice if such an erroneous verdict could work as an estoppel in the prosecution for the commission of a separate and distinct crime. Certainly no one will quarrel with the principle that neither the doctrine of *RES ADJUDICATA*, collateral estoppel or estoppel by judgment will be applied where it will result in an injustice.

(3) The foregoing is considerably aggravated when we remember that the state may not compel one so charged to give discovery because of his constitutional privilege against

self-incrimination--not so in a purely civil action where discovery is mutual and the doctrines have been extant for many years.

(4) The state has an infinitely greater burden of proof than does a civil litigant.

(5) To apply such a doctrine as a constitutional mandate would result in the arbitrary over-weighing of the particular verdict rendered rather than a detailed regard to the particular evidence introduced.

(6) It would hopelessly confuse the entire body of law in those states which do not have statutory proscriptions against subsequent prosecutions but rather treat the matter on the principle of double jeopardy, vis-a-vis the same offense. We say this because we would have to thereafter determine what constituted a course of action in a criminal case. Were the parties the same? Were the issues the same? Was the proof in one exactly the proof in the other? If this would ultimately result in there being no difference in a course of action and an offense, then who needs it since it is the same as double jeopardy.

(7) The application of such doctrines would encourage multiple crimes at or about the same time since an adjudication of one would be conclusive of all the others.

(8) Most of the complaint regarding multiple prosecutions is that a given court is really wearing out a defendant more than anything else. In light of the revolution in the criminal law and the vast expansion of the rights guaranteed to a criminal defendant, this is, at best, unlikely since the state must supply a given defendant with the means by which to prepare a defense. To this extent, certainly such an argument is hardly compelling. We do add here that since the petitioner committed the multiple acts, he is hardly in a position to seek

equity. The doctrines of collateral estoppel and *RES ADJUDICATA* are both doctrines based upon equity.

Though not in any sense a parallel to the situation at bar, the case of *HOTEMA v. UNITED STATES*, (1902), 186 U.S. 413, 46 L.ed. 1225, 22 S.Ct. 895, was at least tacit recognition by this Court of the fact that double jeopardy, when involving multiple victims was not going to be made available to a complainant suffering individual prosecutions. There this Court rejected a plea of double jeopardy, observing that Hotema had been charged with the murder of three different persons on the same day. The Court considered that it did not matter that he had been acquitted with regard to one victim, the jury was hung as to another and convicted him as to the third. If that result could follow, and it did, then who can here quarrel with what the outcome would be? Terminally, even if we assume that a modified jeopardy argument under collateral estoppel might prove appealing to this Court, it is suggested that there is no present basis upon which the theory could earn a constitutional mandate from this Court in a criminal prosecution. This is so even if we consider the case of *SEALFON v. U.S.*, 332 U.S. 575, 92 L.ed. 180, 68 S.Ct. 237, which, some might say, represents a sort of application of that theory to a criminal case. We contend that it was nothing of the kind since it only dealt with the question of whether one acquitted of a charge of conspiracy to defraud the United States may thereafter be prosecuted for the substantive crime. Even if that is put aside, there is no basis upon which it should reach constitutional proportions but should instead simply be a procedural matter left to the courts of the several states. In short, respondent opts for the proposition that it should enjoy no greater stature here than does *McNABB v. U.S.*, 318 U.S. 332, 340, 87 L.ed. 819, 63 S.Ct. 608, rehearing den 319 U.S. 784, 87 L.ed. 1727, 63 S.Ct. 1322. If *McNABB*, supra, has nothing to do with proceedings in the several states then no principle, not even that which might be considered under the theory in *SEALFON*, supra, should make collateral estoppel applicable here. In short,

the doctrine of collateral estoppel should be considered as little more, if anything, than a procedural control and not a constitutional mandate to throttle the several states. See *ABBATE v. U.S.*, supra.

POINT II

Respondent cheerfuly concedes, under this point, that this Court has held that a sentencing judge may refer to the matters contained in a presentence investigation report. *WILLIAMS v. NEW YORK*, 337 U.S. 241 (1949), and *WILLIAMS v. OKLAHOMA*, 358 U.S. 576 (1959).

Petitioner, with a similar degree, admits that the court below was quite in accord with Florida law when it declined to make the presentence investigation report available to him. In so doing, it acted within the scope of *MORGAN v. STATE*, Fla., 142 So.2d 308, which has long been the law in Florida and indeed is the position assumed by other states. Certainly there are a host of jurisdictions (cited by petitioner) which take his view. There are almost as many which take the middle road, leaving the matter one of discretion with the trial court.

Respondent is quite aware of what the American Bar Association Committee on the Implementation of Minimum Standards for Criminal Justice hopes to do with Section 2.3 thereof relating to appellate review of sentences since the writer is the deputy chairman of that committee in Florida. But we are not talking about what one day may be as much as we are about what has been and whether so having been it violates a constitutional provision. If, under the recent adoption of Rule 32 (c) (2) of the Federal Rules of Criminal Procedure, the trial court is allowed discretion in whether to disclose presentence reports, then surely Florida's rule, a la *MORGAN*, supra, cannot be constitutionally tainted.

There is yet an additional reason why no constitutional infirmity either does or should exist in the practice followed in Florida. Florida has long followed the practice of not reviewing sentences so long as that which was imposed was within the limits prescribed by the law violated. Certainly the term of six months to five years for the crime of larceny is well within the penal provisions of Chapter 811, Florida Statutes. Assuming that it is otherwise not illegal, it is not a matter which will be reviewed on appeal. See *DICKINSON v. STATE*, Fla., 170 So.2d 594.

Whatever view one may take of the wisdom which forms the predicate for the several views held in the several jurisdictions dealing with the matter, there are compelling reasons why the matter should not and need not be made available to defendants.

Primary, among them, is the fact that no portion of the presentence investigation report goes to the question of guilt or innocence. Just as the *voir dire* examination in *WITHERSPOON v. ILLINOIS*, 20 L.ed 2d 776, did not, in this Court's view, upset the conviction. Therefore, if there was hearsay in it or matters which ordinarily would not have been put before the jury, that reason has no existence at this stage of the trial. If the trial judge could have sentenced petitioner as he did with or without a presentence report, then respondent submits that it matters not at all that he did not make the contents of such a report available to defendant.

Yet another reason is that the fear of allowing extraneous matter to allegedly work untoward harm on him is quite unjustified. We keep hearsay and other matters concerning one's guilt or innocence away from the jury because they are

not equipped to assess it in light of its source. Not so with a judge who is seldom, if ever, prey to such failings. He knows hearsay for what it is and lends it only so much value as it may earn in the aggregate report. He is as cautious of hearsay as he needs to be when he sustains objections to testimony attempting to introduce it. Therefore he need not be lectured or cautioned as to what, if anything, should be done with regard to hearsay matters.

The third reason is that it must at once be obvious as to why the contents of the report should not be made available. Were we to do this, then defense counsel or their clients or their friends would be inclined to at least cause embarrassment among those who spoke ill of them when interrogated by the people conducting the investigation. Just as soon as this had happened a handful of times, the very well-spring of information that at least provides some insight to the judge would have run dry. We must protect those people from the harassment which would have to follow. There is nothing novel in this. It is done every day in virtually every jurisdiction of the land when the question of whether to disclose the identity of a confidential informant is raised. It is only when the testimony and identity of the informant is critical to prove guilt of the crime charged that any court has ever held that he must be disclosed. Hardly the situation here with the presentence report. Almost all courts agree that the identity of the informant as law enforcement's handmaiden must be protected unless critical to the case.

Nothing here could be said to be critical to the matter of petitioner's guilt--since that had already been established without the report or whatever it may have contained. All that was left was to sentence him. The judge did so well within the limits prescribed by Florida law and we note that the sentence is patently not illegal, with or without the benefit of a presentence investigation report. No matter what the report contained, it could not have resulted in any sentence being

imposed against him greater than that which Florida law allows. Conversely, even if petitioner had been able to examine the presentence report closely and show that some of the matters were at least incorrect or at least the conclusions wrong, the judge could have idly put it by and sentenced him anyway. Therefore, it seems to follow that to place the matter on the level of a constitutional mandate would be to raise the stream above the river. Hardly a desirable conclusion as viewed by respondent.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Respondent to petitioner's counsel, the Honorables Leslie Harold Levinson, 2925 N.W. 12th Place, Gainesville, Florida 32001; Melvin L. Wulf, 156 Fifth Avenue, New York, N. Y. 10010; and Gardner W. Beckett, Jr., 52 Sixth Street South, St. Petersburg, Florida 33701, by mail, this _____ day of October, 1969.

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